IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 16 OF 2006

Mr. Milagres Sales Coutinho,
Seaman, major of age,
Son of late Roque Francisco Coutinho,
Residing at H.No. 745,
Fradilem, Navelim, Salcete, Goa. ..... Petitioner

V e r s u s

1. Mr. Shivaji P. Gawande,
   Son of Pandurang Gawande,
   Major of age, residing at
   House No. 213, W.6
   Calconda, Margao, Goa.

2. State of Goa,
   Through P.P.
   High Court
   (Registered Addresses) ..... Respondent

Mr. J. Godinho, Advocate for the Petitioner/Complainant.

Ms. Asha Dessai, Advocate for the Respondent/Accused.

CORAM: N. A. BRITTO, J.

DATE: 29th November, 2006.

ORAL JUDGMENT

This is Complainant's appeal against the acquittal of the accused under Section 138 of the Negotiable Instruments Act, 1881, vide Order dated 21.11.2005 of the learned J.M.F.C., Margao.

2. The case of the Complainant was that the accused had borrowed from the Complainant on 24.04.2003, a sum of Rs.30,000/- to meet his urgent financial needs and in repayment of the same, had issued a cheque to the Complainant on 25.07.2003 for the said sum drawn on Urban Co-operative Bank Ltd., Margao, which cheque, when presented by the Complainant for clearance, was returned dishonoured for insufficient funds on 25.07.2003, as a result of which, the Complainant sent the statutory notice dated 19.08.2003, which the accused received but failed to comply the same. The Complainant therefore filed the complaint.

3. The Complainant examined himself in support of the complaint and produced the relevant documents including the cheque, cheque return memo, the legal notice, etc.

4. The case of the accused was that he had approached the Complainant for a loan of Rs.5,000/- on the condition that the accused executes a demand promissory note and deposits a blank signed cheque to be kept as security for the repayment of the loan. The accused also stated that he had handed over the said blank cheque in the presence of Shri Prakash Shirodkar of Fatorda and Advocate Lourdes Coutinho. The accused examined himself and also brought one person to be examined as a witness by name Prakash Shirodkar, who filed his affidavit in evidence. According to the Complainant, the said witness brought by the accused as Prakash Shirodkar, was Santosh Naik, resident of Gogol, Margao. This was on 01.07.2005. Once the controversy was raised as regards the identity of the said

Prakash Shirodkar, the said Prakash Shirodkar did not turn up before the Court for further cross examination and consequently, the accused closed his case on 19.08.2005. It may be stated that on behalf of the Complainant, an application was filed to take appropriate action against the accused and the said Santosh Naik and the same is pending.

5. There is no dispute that during the pendency of the case before the trial Court, the accused paid to the Complainant a sum of Rs.4,000/-. The Complainant also admitted that on 07.05.2003, the Complainant advanced to the accused another sum of Rs.5,000/- which has again remained unpaid by the accused. The Complainant also admitted that the subject cheque of Rs.30,000/- was written by the accused i.e. the amount in words as well as figures and was signed by the accused. The Complainant admitted that the date and his name were written by him since the accused had expressed his inability to write the name of the Complainant. The Complainant also stated that he had sent two postcards to the accused requesting for payment of the said loan. The receipt of these postcards have been admitted by the accused. The Complainant had also admitted that the money advanced by him to the accused of Rs.30,000/- was from his business income and that besides he was working as a Seaman. During the cross examination of the Complainant, the accused produced a letter written by him to the Complainant dated 06.06.2003, admitting that he was liable to pay to the Complainant a sum of Rs.11,000/- on or before 16.06.2003 and that due to unavoidable circumstances, the accused was unable to pay the same, as promised. The accused also regretted for his inability to pay the

said amount, as promised by the accused. This letter dated 06.06.2003, has been taken by the learned Trial Court against the Complainant though the same had to be taken against the case of the accused. In fact, it was for the accused to have explained as to how he had admitted his liability to pay Rs.11,000/- to the Complainant when it was his contention that the accused had taken not Rs.30,000/- but only Rs.5,000/- from the Complainant. The accused in his evidence, when questioned about the said letter dated 06.06.2003, exhibit 19, initially stated that he did not remember about the same but subsequently was compelled to admit and admitted that he was aware of the said letter and also identified his signature thereon. The accused also admitted that he had not paid the sum of Rs.11,000/-, as mentioned in the said letter-exhibit 19 by 16.06.2003, as promised. As stated by the Complainant, the accused had given the subject cheque to the Complainant duly signed by him and the amount written thereon both in words and in figures and the Complainant had only written his own name and had put the date.

6. The Division Bench in the case of ***Lillykutty v. Lawrance (2003 (2) DCR 610)***, relying on its earlier Division Bench Judgment, in the case of ***Bhaskaran Chandrasekharan v. Radhakrishnan (1998 (1) KLT 881)*** has held that no law provides in the case of cheques that the entire body has to be written by the drawer only and what is material is the signature of the drawer and not the body of the instrument and the burden is entirely of the drawer of the cheque to establish that the date, amount and the payee's name are written by somebody else without the knowledge and consent of the drawer. This Court in ***Mrs. Shila @ Sudha***

Manjunath Vernekar v. 1. Mr. Rayaba S. Dessai & anr. (Unreported Judgment dated 27.01.2005 in CRIR no. 29/2004), held that, there is preponderance of judicial opinion in favour of the proposition that when a cheque is issued duly signed by the drawer and the holder completes the same in other respects namely as regards the amount due and the date, the presumption would still be available to the complainant/holder unless the accused shows that the said particulars were filled in without the consent of the accused/drawer. Considering the facts stated by the Complainant, this is a case where the Complainant had in his favour all the presumptions available to him under Sections 118, 138 and 139 of the Act and the only question was whether the accused had proved anything to the contrary that the cheque was not issued for discharge for the debt claimed by the Complainant.

7. The case put forward by the accused has been confusing and conflicting. Firstly, an adverse inference has got to be drawn against the accused for non-examination of the said Prakash Shirodkar, in whose presence, the accused is stated to have given a blank cheque to the Complainant. It is not understood if the Complainant had taken a loan of Rs.5,000/- only, as to why the accused had to give a blank cheque to the Complainant. The cheque ought to have been for Rs.5,000/-. If the accused had given a blank cheque to the Complainant, there is no reason why the accused had to tell the Complainant not to deposit the said cheque, as stated by the accused in his statement under Section 313 of the Code of Criminal Procedure, 1973. If the accused had issued a blank cheque, it was expected of the accused to have reacted immediately upon receipt of the postcards demanding payment by the

Complainant as well as the statutory notice, which the accused admitted he had received. In case the accused had borrowed only Rs.5,000/- from the Complainant, the accused has not been able to give any explanation whatsoever why he admitted his liability in a sum of Rs.11,000/- in his letter dated 06.06.2003, exhibit 19. There was no obligation on the part of the Complainant to have replied the said letter dated 06.06.2003 and only because the Complainant had not replied to the said letter, the said letter could not have been taken against the Complainant, as sought to be done by the learned J.M.F.C. If at all the Complainant had given another loan of Rs.5,000/- on 07.05.2003, the Complainant had ensured that it should be secured by a demand promissory note executed by the accused. The said letter dated 06.06.2003, exhibit 19, and non-examination of the said Prakash Shirodkar falsify the case of the accused that the subject cheque was given by the accused to the Complainant in blank as against the payment by the Complainant to the accused in the sum of Rs.5,000/- only. The accused also failed to examine Advocate L. Coutinho, who according to the accused was present at the time of handing over of the said blank cheque and it is informed that the said Advocate Coutinho, on the other hand, appeared before the trial Court for the Complainant. The Apex Court in the case of ***Hiten P. Dalal v. Bratindranath Banerjee ((2001) 6 SCC 16)***, has stated that it is obligatory on the Court to raise the presumptions under Section 138 and 139 of the Act in every case where the factual basis for the raising of the said presumption have been established and the obligation on the prosecution may be discharged with the help of presumptions of law or fact unless the accused adduces evidence showing the reasonable possibility of the non-existence of the presumed fact. The Apex Court

has also stated that the rebuttal does not have to be conclusively established but such evidence must be adduced in the Court in support of the defence that the Court might either believe the defence to exist or consider its existence to be reasonable probable, the standard of reasonability being that of the prudent man. The case of the Complainant has been consistent and convincing while the defence of the accused is conflicting, as already demonstrated. Considering the evidence of the accused, it could not be said that the accused had rebutted the presumptions available to the Complainant under Sections 118, 138 and 139 of the Act. Therefore, the learned J.M.F.C. ought to have accepted the case of the Complainant as proved and rejected the defence of the accused.

8. Consequently, the appeal deserves to succeed. The impugned Judgment dated 21.11.2005 is hereby set aside. As a result, the accused is hereby convicted under Section 138 of the Act. On behalf of the accused it is submitted by his learned Counsel that a lenient view be taken considering the amount involved and financial status of the accused. On the other hand, on behalf of the Complainant, it is submitted that substantive sentence of imprisonment be imposed on the accused.

9. Considering the facts of the case, the accused is hereby sentenced under Section 138 of the Act to undergo S.I. for seven days and to pay a compensation of Rs.34,000/-, (in addition to Rs.4,000/- already paid to the Complainant), and in default to undergo S.I. for a period of three months.

10. At the request of the learned Counsel appearing on behalf of the accused, the sentence is suspended for a period of four weeks. After the expiry of the said period, the learned trial Court is directed to carry out the execution of the said sentence.

N. A. BRITTO, J.

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